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CASE NO. 92-1963

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

JOSHUA ANDHOGA,

PETITIONER

V.

IMMIGRATION AND NATURALIZATION SERVICE,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Joshua Andhoga
1001 South Center #213
Arlington, Texas 76010
817/795-2660
Pro Se

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Question Presented for Review

The Board of Immigration Appeals (BIA) elected against having a transcript made of an immigration court hearing, ruling that Petitioner had filed his notice of appeal appeal late. However, the Board of Immigration Appeals based its decision, in part, on a factual determination that Petitioner was not entitled to the discretionary relief requested (suspensions of deportation). The question thus presented is whether the absence of the transcript from the record deprived Petitioner of procedural due process.

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Barlow v. Collins, 397 U.S. 159

STATUTES

Section 106 of the Immigration and Naturalization Act, 8 U.S.C §1105a

STATEMENT OF JURISDICTION

The decision of the Fifth Circuit Court of Appeals was rendered on February 26, 1993 and is reprinted in the Appendix. This is a petition for writ of certiorari from that decision. The jurisdiction of this Court is invoked pursuant to 28 U.S.C §1254(1).

Section 106 of the Immigration and Naturalization Act, 8 U.S.C. §1105a provided the statutory basis for an appeal to the Fifth Circuit from the decision of the Board of Immigration Appeals. It is set out in the appendix.

Petitioner originally sought relief under Section 244(a) of the Act, 8 U.S.C. §1254(a). It is set out in the appendix.

STATEMENT OF THE CASE

The petitioner is a native and citizen of Kenya. The petitioner entered the United States in May 1982 as a nonimmigrant student.

This matter was initiated by the Service on July 18, 1989 when it filed an Order to Show Cause with the Immigration Court in Dallas, Texas. In this Order the Service alleged that Petitioner was admitted as a nonimmigrant student and was authorized to remain in the United States for duration of status; that he failed to pursue a full course of study; and that he was employed, without permission, as a dishwasher from June 12, 1989; and that all these allegations constituted a violation of Section 241(a)(9) of the Immigration Act.

Petitioner filed an Application for Suspension of Deportation on April 11, 1990. Judge Edwin R. Hughes of Dallas, Texas denied the application for Suspension

and issued his Memorandum of Oral Decision to that effect on June 28, 1990. On July 23, 1990, Petitioner filed his Notice of Appeal. On July 23, 1990, the Executive Office of Immigration Review (EOIR), Office of Immigration Judge, (OIJ) issued a memorandum to the EOIR, Board of Immigration Appeals, stating that Petitioner's appeal was untimely made and requesting instructions from the Board as to whether a transcript is necessary. On October 26, 1990, the Board of Immigration Appeals dismissed the appeal stating that it was untimely.

On May 23, 1991, Petitioner filed a Motion to Reopen/Reconsider with EOIR, OIJ. By decision dated December 2, 1991, the BIA denied Petitioner's May 1991 Motion to Reopen or Reconsider.

On February 25, 1992, Petitioner filed a Motion to Re-Open/Re-Consider, and on March 3, 1992, Petitioner filed supplementary materials to his Motion to Reopen. On

March 10, 1992, the Immigration Judge issued an order denying Petitioner's February motion to reopen. On March 23, 1992, Petitioner filed a Notice of Appeal to the BIA. By decision dated May 7, 1992, the BIA dismissed Petitioner's appeal. Appeal to the Fifth Circuit was then taken, and the Fifth Circuit rendered its decision on February 26, 1993 dismissing Petitioner's petiton.

The Fifth Circuit had jurisdiction of this case pursuant to Section 106(a) and (a)(1) of the Immigration and Naturalization Act, 8 U.S.C. §1105a(a) (a)(1).

REASONS FOR GRANTING THE WRIT

This case concerns a question of procedural due process. It is submitted that the Fifth Circuit erred when it failed to address Petitioner's point of error about the failure of the BIA to bring up

the transcript from the Immigration Judge for review. It is a fundamental rule of fairness that a reviewing agency cannot make an informed decision unless it has the full transcipt before it. The failure of the Fifth Circuit to enforce this rule has resulted in a fundamental compromise of Petitioner's procedural due process rights.

When fundamental due process rights are implicated, it is imperative that a strict standard of review should be applied. See Barlow v.Collins, 397 U.S. 159. For this reason Petitioner prays that this Court grant his writ of certiorari so that the issue of procedural due process may be reviewed.

WHEREFORE, Petitioner prays that this petition be granted.

Respectfully submitted,

Joshua Andhoga
1001 South Center #213
Arlington, Texas 76010
817-795-2660

Certificate of Service

I certify that three true and correct copies of the foregoing have been served on the Immigration and Naturalization Service this 27th day of May, 1993, at the following address: Anne C. Arries, Attorney, Office of Immigration Litigation, Civil Division, Department of Justice, Post Office Box 878, Ben Franklin Station, Washington, D.C. 20044, 202 501-7361.

Joshua Andhoga

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4786

Summary Calendar

JOSHUA OGAL ANDHOGA, Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(A29 574 883)

Before HIGGENBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Joshua Andhoga petitions for review of an order of the Board of Immigration Appeals ("BIA") dated May 7, 1992, dismissing his appeal of the immigrationjudge's denial of his motion to reopen his deportation proceedings. In its comprehensive opinion, the BIA set forth Andhoga's repeated efforts to delay his

deportation and the BIA's reasons for dismissing this, his latest attempt. Essentially for the reasons set forth by the BIA, we deny the petition for review and affirm the BIA's dismissal of Andhoga's appeal of the immigration judge's denial of the motion to reopen.

Even if, arguendo, the other reasons given by the BIA were without merit, the BIA was well within its descretion in denying relief on the merits. As the BIA stated in its opinion,

> The respondent is deportable under section 241(a)(9) of the [Immigration and Nationality] Act, 8 U.S.C. §1251(a)(9), for violating his nonimmigrant student status which he has not challenged. The respondent admittedly failed to report for deportation as ordered and did not request a stay. the respondent has advanced an unmeritorious claim for suspension of deportation. We, like the immigration judge, find that the motion was filed to cause unnecessary delay.

To date, Andhoga has taken advantage of the system to delay the inevitable. There is no merit to his claim for relief, and it is time for this proceeding to be brought to a close. The petition for review is DISMISSED, and the order of the BIA is AFFIRMED.

SECTION 106 OF THE INA
8 U.S.C.§1105(a)

(a) The procedure prescribed by, and all the provisions of chapter 158 of title 28, United States Code, shall apply to, and shall be the sole and exclusive procedure for, thejudicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that--

(1) a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation

order, or, in the case of an alien convicted of any aggravated felony, not later than 30 days after the issuance of such order.

Section 244(a) of the Act, 8 U.S.C. §1254(a) provides:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an aliend described in section 241(a)(4)(D))) who applies to the Attorney General for suspension of deportation and--

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period

of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attoreny General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraph (2), (3), or (4) of section 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the

Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

U.S. Department of Justice
Executive Office of Immigration Review
Office of the Immigration Judge
FederalBuilding, Room 2C8
1100 Commerce Street
Dallas, Texas 75242

July 23, 1990

To: Board of Immigration Appeals
Falls Church, Virginia

From: John Meehan, Management Officer
Dallas, Texas

Subject: Joshua Ogal Andhoga
A29 574 883

The above case was heard on June 28, 1990. The appeal was due on July 9, 1990, but was filed on July 23, 1990. Due to the untimely nature of the appeal a transcript of the hearing and of the oral decision of the Immigration Judge was not ordered. The respondent's record of proceeding file is forwarded herewith for your consideration. Please advise if a transcript is necessary.

Appeal was filed July 19, 1990 with the Immigration and Naturalization Service. And E.O.I.R. 27 form was not attached.

Attorney Sam Wood E.O.I.R. 28 is on file. But the Appeal form is Submitted by Attorney Bob Ware Without E.O.I.R. 27.
MJG/s
[088 of the certified record below]

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virgina 22041
File: A29 574 883--Dallas

In re: JOSHUA OGAL ANDHOGA

October 26, 1990

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT
Bob Ware, Esquire, 2404 Team Bank Building, Suite 2404, 500 Throckmorton Street, Fort Worth, Texas 76102.

ON BEHALF OF SERVICE: Ronald L. Mullins
General Attorney

CHARGE:

Order: Sec. 241(a)(9), I&N Act [8 U.S.C. §1251(a)(9)]-Nonimmigrant--failed to comply with conditions of status

Application: Suspension of deportation; voluntary departure

The record reflects that the immigrationjudge rendered his decision on June 28, 1990, and that the Notice of Appeal (Form EOIR-26) was filed on July 23, 1990. We find that the appeal is untimely. See 8 C.F.R. §§ 3.36(b); 242.21(a) (1990).

ORDER: The appeal is dismissed as untimely.

/s/ David L. Milholan
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virgina 22041
File: A29 574 883--Dallas

Date: May 7, 1992

In re: JOSHUA OGAL ANDHOGA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT
Pro Se

ON BEHALF OF SERVICE: Wayne Kimball
General Attorney

CHARGE:

Order: Sec. 241(a)(9), I&N Act [8 U.S.C. §1251(a)(9)]-Nonimmigrant--failed to comply with conditions of status

Application: Reopening

In a decision dated March 10, 1992, the immigration judge denied the respondent's motion to reopen. The respondent timely appealed from that decision. the appeal will be dismissed.

The immigration judge rendered an original decision in this case on June 28,

1990, denying the respondent's application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §1254(a)(1), 244(e) of the Act, 8 U.S.C. §1254(e), and ordering him deported to Kenya. An appeal was due by July 9, 1990. A Notice of Appeal (Form EOIR-26) was not filed with the Office of the Immigration Judge until July 23, 1990, and the Board thus dismissed the appeal as untimely on October 26, 1990. The respondent had contended on the Notice of Appeal that he wished to remain in the United States to complete his course of studies at the Texas A & M University. He claimed that he would suffer extreme hardship both psychologically and socially if he is deported before obtaining a degree.

When this case was last before us on December 23, 1991, we denied the respondent's motion to reopen or reconsider

our dismissal of his appeal as untimely. In the motion filed on May 28, 1991, the respondent claimed ineffective assistance of counsel with respect to the untimely filing of the appeal. The Board denied the motion based on lack of jurisdiction, and failure to comply with Matter of Lozada, 19 I&N Dec. 637 (1988), even if we had jurisdiction. In the latter regard, we found that the respondent presented no evidence to indicate whether his former counsel, Bob Ware, had been informed of his allegations and that the record did not contain counsel's position in the matter. We indicated that we did not know whether or not the respondent complied with his responsibilities under the agreement. We also found that the motion did not reflect whether a complaint had been filed with the appropriate disciplinary authorities.

The respondent filed a motion to reopen/reconsider with the Office of the

Immigration Judge on February 25, 1992, requesting reopening of deportation proceedings and suspension of deportation. Included with the motion was a copy of a handwritten letter dated September 13, 1990, to the Office of the General Counsel of the State Bar of Texas, in which the respondent expressed his dissatisfaction with the manner in which his former counsel handled his case; a cpy of a physician's bill statement dated May 7, 1985; a copy of a readmission letter dated August 17, 1988, from Texas A & M University; a copy of a business card of a Charles McElroy, a research associate at tne Texas A & M University; and a copy of the attorney's fee agreement with attorney Bob Ware. In the motion, the respondent again claimed ineffective assistance of counsel and professional negligence in the filing of the untimely appeal. The respondent stressed his desire to resume his studies

in the International Agricultural Program of Texas A & M University and that he needed clearance from the immigrationa authorities to do so. The respondent submitted additional documents in support of the motion on March 3, 1992, which included copies of correspondence from attorney Bob Ware regarding the appeal filing fee and the filing of the appeal; a copy of his social security card; and a copy of his Texas Department of Public Safety identification card.

The Immigration and Naturalization ("Service") opposed the motion. The Service provided evidence that the respondent was ordered on February 5, 1992, to report for deportation on February 24, 1992. In a supplementary brief to the instance motion, the respondent conceded service of the order and indicated that the preparation time to report and return to Kenya was short. He also contended that it

was improper for the Service to order him to report for deportation as his motion to reopen was on file.

The immigration judge denied the motion to reopen on the basis that the motion did not raise a request for relief that he could grant. He pointed out that he had no authority to restore the respondent's nonimmigrant student status which the respondent termintated by not attending class and working in contravention of his nonimmigrant status. The immigration judge also found that the complaint raised concerning counsel was not relevant. He stated in that regard that, whether the appeal was timely or not, it did not challenge the validity of his original decision or seek relief fffrom the Board which it could have granted. He noted that the appeal was thus frivolous, timely or not. The immigration judge

regarded the present motion to be frivolous and to hve been presented soley for delay.

On the instant Notice of Appeal, the respondent reiterates his claim of professional negligence regarding the untimely appeal. He notes that he discussed the matter with the attorney in person, and filed a complaint with the disciplinary authorities. He also notes that his motion is supported by copies of affidavits of action tkaen and letters given to him by his former counsel. The respondent raises a claim of physical due to stress and asserts difficulty in being able to obtain money without a stay from deportation. The respondent resubmitted documents with the Notice of Appeal that were filed below and submitted physicians bill statements. The respondent requests suspension of deportation.

A motion to reopen must state new facts to be proved at the reopened

proceeding and be supporte by affidavits or other documentary evidence. 8 C.F.R. §103.5 (1991). The requirements for a motion to reopen exclusion or deportation proceedings have recently been reiterated in part by the Supreme Court. INS v. Doherty, _ _ U.S. ____, 112 S. Ct. 719 (1992). The Court emphasized that the decision whether to grant a motion to reopen is subject to broad discretion, and that reopening is disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. Citing INS v. Abudu, 485 U.S. 94, 107-108 (1988). More specifically, a motion to reopen may be denied on "at least" three independent grounds: failure to establish a prima facie case for the relief sought, failure to introduce previously unavailable evidence, and a detrmination that even if the requirements are met, the movant would

still not be entitled to the relief sought. INS v. Doherty, supra, 112 S.Ct. at 725 (interpreting 8 C.F.R. §3.2, motions to reopen).

We find no merit in the respondent's appeal. The respondent's complaint to the Texas Bar authorities was dated prior to our December 23, 1991 decisin denying his motion to reopen or reconsider and was available at the time he filed his first motion on May 28, 1991. See 8 C.F.R. §242.22 (1991). The record remains without any documentary evidence of whether his former counsel has been informed of his allegations and does not contain hs position in this matter. See Matter of Lozada, supra. The record likewise still does not reflect whether the respondent complied with his responsibilities under the agreement with his former counsel.

Further, the respondent has failed to introduce previously unavailable evidence

or establish prima facie eligiblity for suspension of deportation. Throughout these proceedings the respondent has merely maintained that he seeks suspension of deportation to remain in the United States and complete his educational studies. The respondent has raised an unsupported and cursory claim of physical ailment due to stress. The factors proffered by the respondent considered individually and collectively are clearly insufficient to establish a prima facie case of extreme hardship. See Vargas v. INS, 8267 F.2d 1394 (5th Cir. 1987); Ganjour v. INS, 796 F.2d 832 (5th Cir. 1986); Sanchez v. INS, 755 F.2d 1158 (5th Cir. 1985). Moreover, we find that reopening is not warranted as a matter of discretion. The respondent is deportable under section 241(a)(9) of the Act, 8 U.S.C. §1251(a)(9), for violating his nonimmigrant student status which he has not challenged. The respondent admit-

tedly failed to report for deportation as ordered and did not request a stay. The respondent has advanced an unmeritorious claim for suspension of deportation. We, like the immigration judge, find that the motion was filed to cause unnecessary delay. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ James P. Morris

Executive Office of Immigration Review
Office of the Immigration Judge
Federal Building, Room 2C8
1100 Commerce Street
Dallas, Texas 75242

In the Matter of	§	File no 29 574 883
	§	
Joshua Ogal Andhoga	§	In Deportation
	§	Proceedings

Memorandum of Oral Decision

This is a summary of the Oral Decision & Order issued today intended soley for the convenience of the parties. If reviewed the transcrbed & signed Oral Decision will be the official decision & order in this case.

Respondent was/was not found deportble under Section 241(a)(9) of the Immigration and Nationality Act of 1952 as amended.

Respondent applied for the refief of Suspension Sec. 244(a)(1) which was denied.

Respondent applied for the alternative relief of Vol Departure 244(e) which was denied.

Respondent was ordered deported to Kenya.

Appeal was reserved by INS/Respondent. Any appeal is due by July 9, 1990.

Date: June 28, 1990.

/s/_____
Edwin R. Hughes
Immigration Judge